APPEAL NO. 93184

On February 2, 1993, a contested case hearing was held, on remand, in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, who is the appellant, sustained an aggravation of a repetitive trauma back injury in the course and scope of employment as a pipe fitter for (employer), with the date of injury determined to be (date of injury) (the date that he knew, or should have known, that his condition was related to his employment). The hearing officer determined that the claimant had not given notice of his injury to his employer within 30 days of this date, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01(a) (Vernon's Supp. 1993) (1989 Act), that the employer did not have actual knowledge of the injury, and that the claimant had not proven good cause for failure to give such notice. The hearing officer determined that the claimant was prevented from obtaining and retaining employment at wages equivalent to his preinjury wage because of the injury, but determined that "disability" did not exist, as defined in the 1989 Act, Art. 8308-1.03(16), because the underlying injury was not one for which compensation was payable as a result of lack of timely notice.

The claimant has filed an appeal that disputes the inclusion of disability as an issue at the hearing, and appeals the hearing officer's determination that timely notice was not given, or, if not given, that the claimant did not have good cause. The claimant also argues that the employer had actual knowledge of the injury. Specific fact findings are appealed based upon the evidence, as well as assertions that the hearing officer abused her discretion. The carrier responds that there is sufficient evidence to support the determinations of the hearing officer; as part of its argument, it asserts that "first distinct manifestation" is no longer a concept in the 1989 Act.

DECISION

After reviewing the entire record in this case, we affirm the determination of the hearing officer that timely notice of injury was not given to the employer, and that exceptions to notice did not exist to excuse failure to give notice.

In Texas Workers' Compensation Commission Appeal No. 92589, decided December 14, 1992, we remanded this case "for further development and consideration of evidence related to the date that the claimant knew or should have known that he had an aggravated repetitive trauma injury, whether there was good cause for failure to report the injury prior to July 3, 1991; and, if the notice and good cause issues are resolved in favor of claimant, for consideration of the period of any disability sustained by the claimant."

The claimant represented himself at the first session of the hearing. For the appeal of the prior decision, he retained counsel, and was represented by counsel at the second session of the contested case hearing.

SUMMARY OF EVIDENCE FROM FIRST CONTESTED CASE HEARING

The claimant, a 52-year-old man, had been employed for nearly 30 years by the employer, and worked as a pipe fitter for most of that time. In fall 1986, the claimant began to experience lower back and related right leg pain. He stated that he was told he had a pinched nerve in his back. The claimant identified his doctors as (Dr. D), and (Dr. M). He stated that he did not realize, and Dr. M did not tell him in 1986, that his back injury was work related. The claimant affirmed that if he had understood that work caused his back pain, he wouldn't have kept doing the same thing. However, claimant stated he did no moonlighting or heavy lifting aside from work. He stated that he thought Dr. M may have told him in 1986 that he had a herniated disc, but he was not sure.[1] However, his testimony also indicated that, although he could not recall any specific incident that triggered his pain, the nature of his work caused pain to recur, to the point where he had to take off work at various times from 1986 through May 1991. Claimant testified that Dr. M recommended against surgery in 1986 and that he controlled his pain and discomfort through medication.

On July 3, 1991, the claimant had emergency laminectomy back surgery for a herniated disc. He said that he could not recall any specific incident where he had picked up anything and his back snapped. But, he recalled that sometime in May 1991, he started out fine in the morning and began to experience pain to the point where he was limping. He stated that his last day of work prior to surgery was May 17, 1991. He consulted Dr. D on (date of injury), who prescribed medication and bed rest as he had done in the past. Claimant said that Dr. D subsequently took "x-rays," found a rupture, and sent him back to Dr. M for a second opinion. Dr. M saw him July 1st, hospitalized him July 2nd for a myelogram, and after this told him that he required immediate surgery. The claimant said that for the first time, he learned that his back condition was caused by his work as a pipe fitter, through his wife, who discussed this with Dr. M. The claimant and his wife both testified that the night after the surgery, July 3, 1991, the claimant spoke on the telephone to (Mr. A), a supervisor for the employer, who was also a friend. They stated that claimant told Mr. A that the back surgery was related to work, and that claimant might have to go on workers' compensation. Claimant's wife stated that she particularly recalled this because when the doctor told them the injury was work related, it was like their world came to an end.

There are no actual medical notes in the record from 1986, although there are later references back to 1986 in the records submitted. Regarding claimant's back, Dr. D's notes from December 21, 1987 stated that claimant had some flare-up of his right sciatica. He was kept off work at that time. This condition was declared resolved by Dr. D, after

[1]A transcription of a recorded statement given by claimant to the adjuster for the carrier on January 27, 1992, states that Dr. M told claimant in October 1986 that he had a ruptured disc and that the doctor preferred not to operate on a man as young as him. The claimant said at both sessions of the contested case hearing that although he said this, this isn't what he meant, and that he cannot recall whether Dr. M told him before that he had a ruptured disc. His responses to this statement assert that he did not realize that his condition was work related, or dated back to 1986, until July or August of 1991.

treatment, in the note of January 1, 1988. In February of that same year, Dr. D stated that it sounded like claimant had some foraminal narrowing which "every now and then pinches a nerve."

On (date of injury), Dr. D recorded that he treated claimant for right sciatica and took him off work, with a follow-up appointment scheduled for a week later. On May 30th, Dr. D ordered a magnetic resonance imaging (MRI) scan and physical therapy evaluation for a possible TENs unit. An MRI was performed June 1, 1991. Dr. D's notes indicated on June 6, 1991, the MRI results showed spinal stenosis with a "possible" ruptured disc at L5-S1 level. Dr. D's notes indicated that this was discussed with claimant along with a recommendation for a second opinion from a surgeon. Thereafter, the notes indicate that claimant had a July 1st appointment with Dr. M.

Dr. M's notes for claimant's surgery reflect that claimant had prior back pain in 1986 and "was told at that time" that he had swelling of the disc which was pinching a nerve. A memo from Dr. M dated August 29, 1991, states that "[claimant's] occupation as a pipe fitter over the last 29 years has contributed to his lumbar disc disease and ultimately to his lumbar disc herniation on which he had surgery on July 3, 1991." This memo sets forth restrictions under a release to light duty work effective September 16, 1991. The claimant said he got this memo at the request of Mr. Robert Ault (Mr. RA) (the employer's loss prevention supervisor). The claimant said that this memo from Dr. M was the first time he was informed that his work-related disc injury could relate back to his 1986 back problems.

Claimant stated that after July 3rd, he informed other persons who worked for employer about his work-related injury. They were Mr. RA, (Mr. N), and (Ms. B) (the occupational health nurse). He said he asked about workers' compensation because he was under the impression he had to have it to qualify for the employer's light duty work. The claimant said that Mr. RA suggested that he draw sickness and accident insurance benefits rather than workers' compensation.

On June 25, 1991 and September 15, 1991, the claimant filed claims for sickness and accident benefits for his back in which "no" was checked in response to "does the condition arise out of employment?" The claim dated June 25, 1991, for sciatica and a possible herniated disc and spinal stenosis, had a portion completed by Dr. D, who indicated "no" on the question that asked whether the condition arose out of employment.

The claimant testified that he worked light duty at the employer from September 16, 1991 through January 24, 1992, for slightly fewer hours but at a higher hourly rate of pay, but then was terminated. The claimant indicated during the hearing (while questioning another witness) that he was not aware of a 30-day reporting requirement.

Mr. A testified and agreed that he spoke with claimant at the hospital, although he

could not remember the time of day. He repeatedly stated that he could not recall specifically events over a year past by the time of the hearing, and he did not remember claimant telling him that his back injury was work related. He said that he believed he would have acted on information from claimant about a work-related injury. However, he stressed that he could not recall the conversation and it had been a hectic day that day, and further indicated on cross-examination that he would have acted on information "if it had been brought to my attention, and where my attention span was that day. . . ."

Mr. N, Ms. B, and Mr. RA stated that their first awareness that claimant had a work-related back injury was sometime in late August 1991, although the actual date was not recalled. Ms. B stated that claimant brought the August 29th memo from Dr. M. The record indicates that an employer's first report of injury was not filed until January 23, 1992. Mr. RA, in his testimony, said that "[claimant] seemed to indicate to me that he didn't feel like it was job related . . . but the doctor kind of put it in his mind that it was job related." Mr. RA, under cross-examination about Dr. M's memo, said that the release didn't say either way whether it was job related. He further indicated that such a release would cause him to ask the employee "do you feel like you're suffering from an occupational injury or not. . . ."

Prior to the first contested case hearing, the carrier was under an interlocutory order to pay temporary income benefits for the period from January 25, 1992 "until MMI is reached." During the period from (date of injury) to the time he went back to light duty work, claimant testified he received disability benefits through the employer's private insurance coverage, although it was not paid on a weekly basis.

SUMMARY OF ADDITIONAL EVIDENCE FROM REMAND

The claimant and his wife testified for claimant; Mr. RA testified for the carrier. There was some repeated testimony about matters covered in the first hearing. Additional facts are summarized here.

Claimant testified that Ms. B, the occupational nurse, had given him crutches sometime in mid-May 1991 while he was still at work, and that he ended up taking these home with him. He testified that he had complained to Ms. B that his back hurt. However, he acknowledged that he did not inform Ms. B until sometime after July 3 or 4, 1993, that his condition was work related. (Ms. B was not present at the remand, and neither testified nor was asked about crutches at the first hearing).

Mr. RA denied that he had any knowledge of Ms. B's loan of crutches or of claimant being absent for a work-related injury in May 1991. The claimant testified that his last day of work was May 17, 1993, and that by the end of that day he was limping. He stated that the differences between this incident, and pain from previous attacks, was a numbness and

pain involving his left leg as well as his right, which he had not felt before. In contrast to the general lack of testimony at the first hearing about claimant's condition after he left work, and prior to his July 3, 1991 surgery, both claimant and his wife testified as to the claimant's considerable pain which they said caused extreme debilitation. The claimant said he mostly stayed in bed and took pain medication, and that he was unable to drive, but had to be driven by others. He was transported to surgery in Houston in a motor home. Although he attended a few of his son's softball games, and went to the doctor, these occasions were rare, according to his testimony. Claimant said he could not read the newspaper or concentrate on things because of the pain. His wife stated that in June 1991 their family life during this period of time was terrible, that she brought claimant's meals to him upstairs to his room, where he stayed most of the time. She bathed claimant. She stated that he cried with pain, something he had not done before. He slept for no more than an hour at a time, and used a bottle for urination.

When questioned in cross-examination about attacks of sciatica that occurred prior to May 17th, both claimant and his wife testified essentially to an absence of any inquiry about what could be causing the pain. The claimant maintained he did not connect his pain to work, although he agreed that when he took days or even weeks off from work, his pain improved. Claimant's wife indicated that her lifestyle of household and family demands and her positive attitude precluded contemplation about what was causing her husband's condition. She stated that they never discussed his pain in terms of what might be the cause, but she had confidence the doctors were doing their job.

Claimant said that he had worked light duty for the employer through January 25, 1992, was terminated because the employer was unwilling to continue the light duty, and that he has inquired about employment but had not obtained a job. He had not seen a doctor for his injury since April 1992.

A deposition on written questions by Dr. D was put into the record. It contains contradictory statements in some respect, and each party in its appeal and response had pointed out Dr. D's statements that favor their own argument. Pertinent statements from the deposition are:

Q7:In you (sic) report dated (date of injury), in the second paragraph, you state, "At this point in time I think he has right sciatica. I would recommend that we take him off work as this is aggravated and that we see him back in one week for follow-up." Please provide us with the basis for the above-mentioned statement.

A:The patient clearly had sciatica as documented in the first paragraph. He stated, and I concurred, that the nature of his physical work had a potentially aggravating effect on his right sciatica.

Q7a:Please state what information [claimant] provided to you that helped you in making the above-stated conclusion.

A:[Claimant] related to me the nature of his job as a pipe fitter. It required, stooping, bending, climbing at times, and occasional lifting of greater than 15 lbs. (i.e., heavy lifting).

Q7b:Please state whether or not you concluded on (date of injury), that [claimant]'s condition or injury was related to or caused by his work.

A:I made no such conclusion. As of 5/22/91 the nature of his work described above was felt to have the potential to aggravate the sciatica we felt was present and hence, I recommended taking him off work.

Q7c:Please state what information you relied upon in reaching the conclusion that [claimant]'s condition or injury either was or was not related or caused by his employment.

A:No specific injury at work was given by [claimant] that my records reflect, nor do I recall any.

Q8:Please state if and when you discussed with [claimant] the relationship between his condition or injury and his employment.

A:I do not specifically recall having such a discussion with [claimant]. I did discuss with him "do's" and "don'ts" of physical activity in a patient with sciatica on 5/22/91, though.

Q12:Please state whether or not your answers to these deposition questions have been based upon reasonable medical probability.

A:They have.

NOTICE AND GOOD CAUSE FINDINGS/POINTS OF APPEAL

Although both advocates argue that the evidence points clearly to their respective clients' favor, this is in fact not a clear-cut case for a trier of fact with respect to date of the repetitive trauma injury under Articles 8308-4.14 and 5.01. It is made much harder when the hearing officer has determined that work has caused an injury, specifically an aggravation of a previous back condition. However, the legislature, in enacting the notice and claim filing provisions that have been in the workers' compensation laws for some time,

has thereby determined that there will be times when a work-related injury will not be compensated because of the failure to give timely notice or timely file a claim. *See* Aetna Casualty & Surety Co. v. Hughes, 497 S.W.2d 282 (Tex. 1973). The notice that is required need not specify the exact nature of an illness, only its general nature and the fact that it is work related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). The fact that one trier of fact could derive different inferences from looking at the same evidence will not compel a reversal of the decision of the trier of fact. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In this case, the evidence for, and against, the various dates of injury argued by the parties in this case.

Aggravation of an occupational disease may be compensable as an injury in its own right when a subsequent exposure to the hazards of the disease contributes to its severity. Aetna Casualty & Surety Co. v. Luker, 511 S.W.2d 587 (Tex. Civ. App.-Houston [14th Dist.] 1974, writ ref'd n.r.e.). Claimant's theory was that this was a repetitive trauma disease, and that this was not conclusively diagnosed at any time prior to July 3, 1991.

In considering this issue, we must first address the carrier's contention that cases discussing "first distinct manifestation" of occupational disease do not apply to the 1989 Act. The legislature has changed date of injury for occupational disease through Art. 8308-4.14 to run, not from the first day disability is caused thereby, Art. 8306, § 21 (repealed), but from the date that the claimant "knew or should have known" that the disease may be related to employment. Although the provision for notice to the employer, Art. 8308-5.01(a), uses the same terminology, under prior law the requirement for notice of or claim for an occupational disease did not run from the date of injury, but from the "first distinct manifestation" of the disease. Article 8307, § 4a (repealed).

As indicated in the Appeals Panel's first decision in this case, "first distinct manifestation" of an occupational disease is comparable to the date a claimant "knew or should have known" that a disease was related to employment. This is the same proposition advanced by J. Montford, A Guide to Workers' Comp Reform, § 5A.01 (b), page 5-10. In commenting on the language change in Article 8308-5.01(a), the treatise notes that the old law and new law phrases are equivalent:

> This is . . . a more direct way of stating this time requirement than the predecessor provision that the notice be given "with thirty (30) days after . . . the first distinct manifestation of an occupational disease. As construed and applied in prior comp law cases, the first distinct manifestation was, in effect, when the employee knew, or should have known, of the employment relatedness of the disease.
>
> Therefore, we believe prior cases construing notice provisions for occupational

diseases are instructive for analyzing Art. 8308-5.01(a). We would note that neither Art. 8308-4.14 nor Art. 8308-5.01 requires that a claimant knew or should have known that work "caused" a disease, only that it was "related to" the employment.

It has been noted that the first symptom of a disease does not equate in all cases to the first distinct manifestation of that disease, and that application of a standard similar to that used to analyze good cause is appropriate. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). The court noted that there could be occupational diseases whose first manifestation could consist of months, as opposed to a certain date as in an accidental injury, that the legislature provided a flexible time for occupational disease notices, and that the trier of fact should consider when the claimant, as a reasonable person, recognized the nature, seriousness, and work-related nature of his disease. *Id*. at p. 665. The court posed the question whether, under the facts of that case, if there was a point prior to the date Smith gave notice when it would have been prudent to expect her to assert her rights.

At the first hearing, the testimonial medical evidence indicated that claimant's diagnosed condition prior to May 1991 was that he previously had a pinched nerve and sciatica, and his attack in May was something he thought was like his others. We questioned in our earlier opinion whether that fact alone would charge claimant with knowledge of an aggravated injury in May 1991 to begin the period for giving notice to the employer. However, at the remand hearing, the claimant and his wife brought forward more evidence indicating that the May 1991 attack, while similar in some respects to previous attacks, resulted in greater pain and debilitation than previously experienced by the claimant. Claimant was unable to work after May 17th up to the date of his surgery on July 3, and he testified to severe limitation of his activities. The medical records bear out that Dr. D saw claimant May 22nd and 30th, and, acknowledging that claimant had attacks before, Dr. D decided to pursue further investigation through an MRI. There was no evidence that he told claimant his condition was not serious. In addition, Dr. D's deposition on written questions indicates a discussion with claimant on (date of injury), about the aggravating effect of claimant's work on his sciatica. It was up to the hearing officer to weigh this against Dr. D's statement that he reached no "conclusion" that the back condition was caused by or related to work. All this evidence, along with claimant's testimony that he did not do heavy activity outside of work, supports the hearing officer's conclusion that the date claimant first knew, or should have known, that his injury was related to employment was (date of injury), in that a reasonably prudent person would have known the nature and seriousness of the injury and its relationship to the duties at work.

As we noted in an earlier decision, the failure of an injured worker to appreciate the seriousness of an injury and his assessment of it as "trivial," can constitute good cause for failure to report an injury within 30 days if such would have been the belief of a reasonably prudent person. Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 (Tex. Civ. App.-

Houston 1964, writ ref'd n.r.e.); *see also* Travelers Insurance Co. v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.-Tyler 1973, writ ref'd n.r.e.). This does not mean, however, that a claimant can persist indefinitely with a severe and debilitating pain, which causes him to leave work and actively seek medical treatment, and still contend that he deemed such an injury to be "trivial." When an injury's effects cause severe and continuing pain, and an inability to do previous levels of work, following an incident at work, the fact that a claimant's doctor cannot state that a condition is related to work will not preclude the trier of fact from finding that the claimant should have appreciated both the seriousness and work-relatedness of an injury. *See* Texas Employers' Insurance Ass'n v. Hubbard, 518 S.W.2d 529 (Tex. 1974). Contrary to supporting the Appeals Panel's speculation (in the first decision) that a good cause claim might apply based upon claimant's feeling that the injury was trivial, claimant's additional evidence about the impact of the injury brought forward during the remand hearing leads nearly inescapably to the conclusion that the May 1991 attack of back pain was appreciably serious, and that a reasonably or ordinarily prudent person could hardly fail to recognize it as such.

The premise of claimant's argument is that because the terms "occupational disease" or "repetitive trauma injury" were not used until after July 3, 1991 the claimant should not have known that his work was "related to" his injury; however, we do not believe that the reasonably prudent person standard requires concrete medical diagnosis. *See* Texas Employers' Insurance Ass'n v. Allen, 519 S.W.2d 194 (Tex. Civ. App.-Corpus Christi 1975, writ ref'd n.r.e.). [Court reverses jury finding that claimant had good cause for delay in filing claim for heart attack pending medical confirmation of causal relationship to work, since ordinarily prudent person would have realized the connection]. Although we would disagree with the hearing officer that claimant's May 1991 injury was "identical" to what he had experienced before, it was not utterly dissimilar either; therefore, the claimant's years of experience with sciatica prior to May 1991 became relevant to analyzing whether a reasonably prudent person would have appreciated the work-relatedness of his enhanced back pain after May 1991. A failure to ask the cause of pain over a period of years has been held not to support good cause for lack of knowledge of the work-relatedness of an injury, applying a standard of ordinary prudence. *See* Texas Employers Insurance Ass'n v. Leathers, 395 S.W.2d 601 (Tex. 1965). The more detailed testimony given at the remand hearing by the claimant and his wife about their apparent lack of inquiry about the cause for recurrent severe back pain and sciatica was apparently weighed by the hearing officer as at least indicative of the failure to act in the manner of a reasonably prudent person in asserting his rights.

Finally, the hearing officer's determination that the employer did not have actual knowledge of injury is supported by sufficient evidence. Claimant himself stated that, although he discussed back pain with Ms. B in May, he did not indicate until after his surgery to the employer that his pain was work related.

WHETHER CONSIDERATION OF A DISABILITY ISSUE WAS ERROR

Disability under the 1989 Act does is not defined solely in terms of physical impairment, but means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Art. 8308-1.03(16). The hearing officer found that there was a causal connection between the claimant's injury and diminished wages; the primary reason for not holding that the claimant had "disability" had to do with the fact that the injury in question was determined not to be one for which compensation would be paid, due to her resolution of the notice issue.

As noted above, disability as an issue was specifically remanded back to the hearing officer for decision by the Appeals Panel. The first decision points out that this was an issue properly before the hearing officer in the first hearing. Consequently, it was before the hearing officer in the remanded proceeding, in accordance with the statute and applicable rules.

While there are other possible dates of injury (Article 8303-4.14) suggested by the record, there is sufficient evidence to support the hearing officer's determinations in this case, and we cannot, reviewing the record as a whole, state that her findings and conclusions are against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Neither do we find support in the record for bias against the claimant or abuse of discretion by the hearing officer, who is charged with the responsibility under the act to act as sole judge of the relevance and materiality of the evidence, as well as its weight and credibility. Art. 8308-6.34(e). We therefore affirm the hearing officer's decision, finding no reversible error.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge